Freight integration: what is the way forward?

Wouter Verheyen

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Quid novi?

Traditionally carriers undertake to carry goods by a specific means of transportation (e.g. by road, air, sea, rail or inland waterways) or combination of means of transportation. In the parcel distribution sector however a new transport model has become predominant. In this model, that we refer to as freight integration, freight integrators undertake to carry the goods, without committing themselves to carry the goods by a specific means of transportation. The choice of this means of transportation is left to the discretion of the carrier. This freedom allows the carrier to select the most efficient transport means at the time of the performance of the contract. This can be beneficial for both parties, but also for society as such a freedom can limit external effects of transportation. Because of these benefits for the parties and because (local) governments strongly support freight integration,[1] freight integration also spread to 'classic' transportation. Nowadays we can identify three types of freight integration: 1) parcel transportation, where transport by air, road (and rail) are considered as being alternatives (hereafter referred to as type I integration); 2) integration of container transportation; where road transportation, rail transportation, inland waterway transportation and short sea shipping are considered as being alternatives (hereafter referred to as type II integration) and 3) integrated hinterland logistics, where in addition to a sea, rail or inland waterways transportation, the four means of transportation mentioned under 2) are considered as being alternatives (hereafter referred to as type III integration).

The PhD-research underlying this article focusses on the question whether the liability rules are adapted to this evolution, or whether they rather form a hindrance to freight integration. Since there are no laws that specifically apply to freight integration contracts, the answer to this question depends on the fact whether the existing liability rules can be applied to freight integration contracts without creating legal uncertainty for the parties to the freight integration. Our research shows however that this is not possible since questions arise both with regards to the qualification of the contract as with regards to the applicable law. Therefore we make some recommendations for changes to the legal framework, in order to make it more fit for freight integration.

The (missing) legal framework

There is no specific regime governing the liability of freight integrators. Therefore their liability is governed by, depending on their qualification, carriage regimes or by specific regimes governing transport intermediaries. If no specific regime is applicable, general contract law might be applicable.

[1] See for example: ZLU e. a. , "Studie on Freight integrators, to the commission of the EU, Final report", Berlijn, 2003, http://ec.europa.eu/transport/logistics/documentation/freight_integrators/doc/final_report_freight_integrators.pdf

From the research it follows that there is both uncertainty with regard to the qualification of the integrator and, in case of qualification as a carrier, the applicable (carriage) regime.

Qualification of the freight integrator

All national regimes have distinctive liability rules for companies who undertake to carry the goods (carriers) and companies who undertake to organise the carriage (freight forwarders or *commissionnaires de transport* (French law)). Although the freight integrator undertakes to carry the goods, and therefore should be qualified as a carrier, in practice the distinction is much more difficult to make because first of all it is often unclear what parties agreed upon and secondly, the freight integrator, just like the freight forwarder and *commissionnaire de transport* acts as a transport organiser.

The question whether parties to the freight integration contract can predict the later qualification in possible court proceedings depends on whether 1) there is an information duty for the service provider to disclose a certain capacity, 2) judges attribute major importance to elements known to the parties at the time of the conclusion of the contract or rather to 3) the way in which the contract was performed.

In most jurisdictions there is an information duty for the service provider who wants to rely on the qualification of a freight forwarder. Moreover the way in which the contract was performed (whether the service provider carried the goods himself or rather had them carried) is only taken into account when the service provider carries the goods himself. In this situation the service provider is qualified as a carrier, a qualification that is favourable to the cargo interest. While the freight forwarder is only liable for fault, and there is no presumption of liability, the carrier is presumed liable and can only be exempted from liability in a limited number of situations.

Nevertheless, uncertainties with regard to the qualification of the freight integration contract can arise if French courts might be competent. Under French law the freight integrator is very likely to be qualified as a *commissionaire de transport,* to whom carriage laws are not applicable. In France there is first of all no information duty for the *commissionnaire de transport* and secondly both the qualification as a carrier and as a *commissionaire de transport* largely depends upon the way of performance of the contract. Consequentially at the time of the conclusion of the contract it is often impossible for the cargo-interest to anticipate the later qualification of the contract. However, the difference between carrier and *commissionnaire de transport* is much more limited than the difference between carrier and freight forwarder. The *commissionaire de transport,* just like the carrier, takes up an *obligation de résultat,* and is presumed liable. Still, the potential qualification as *commissionaire de transport* has important liability consequences since there is no mandatory regime applicable to the *commissionaire de transport.* Consequentially exoneration clauses that might be void in case of qualification of the freight integrator as a carrier might be held valid in case of qualification as *commissionaire*. On the other hand when the *commissionaire de transport* didn't include a limitation clause or this clause is found invalid by the court, the liability of the *commissionaire de transport* is unlimited. To summarize, when the case can be brought before French courts, the liability position of parties is very uncertain, even if reference is made in the contract to a carriage regime.

Freight integration and applicable carriage law

Although in most jurisdictions there is no great uncertainty with regard to the qualification of the freight integrator, still the liability position under the contract of carriage is often very uncertain. The reason for this uncertainty lies in the fact that the in case of freight integration the freedom of choice of the integrator extends over a number of means of transportation that very often do not fall within the scope of a single liability regime. Moreover in most jurisdictions transport legislation is interpreted in such a way that the means of transportation that was used for the performance of the contract determines the applicability of the specific norms. Consequently, until the carrier selects the means of transportation the parties to a freight integration contract in general cannot know the applicable liability regime. There are only two exceptions to this rule. First, when the freedom of choice of the carrier is limited to means of transportation that fall within the scope of a single regime and second, when the regimes are interpreted in such a way that a consent on the use of the specific means of transportation is required at the time of the conclusion of the contract for the applicability of a specific norm. In this case parties can be certain of the non-applicability of the specific regime at the time of the conclusion of the contract. However, there are only very few regimes/ national interpretations where at least one of these two conditions are met, and where parties can have certainty with regards to the applicable regime. Moreover, since carriage law is often mandatory applicable, when applicability is uncertain, parties cannot create certainty by excluding the applicability contractually.

First problem: scope of application of convention very rarely extends to all alternatives

Options for type I and II integration: never uniform framework in international law, sometimes in national law.

In the introduction we identified three types of freight integration. International conventions never have a mode of transportation that extends to all means of transportation that are considered as alternatives for the type I and II freight integration. The scope of conventions is limited to transport by a specific medium (in case of sea and air conventions), infrastructure (in case of rail or inland waterways transportation) or even specific type of vehicle (CMR). The same is true for, for example, the Belgian and Dutch national laws. National law can however offer a uniform framework for certain types of freight integration in Germany (when short sea shipping is not an option),[2] France (in case of an option for road and inland waterways (possibly also railroad transportation)[3] and the UK (land transportation).

Options for type III integration: sometimes uniform framework in international law.

Although conventions are never adapted to type I and II integration, sometimes they are adapted to the type III integration: COTIF-CIM, the Montreal Convention and the Rotterdam Rules contain a so called plus-mode, extending the scope of application beyond the core-mode (the means of transportation on which the applicability of the convention depends), to other means of transportation than the ones that fall under the core mode.

[2] §407 and further HGB apply to all transport by land, air and inland waterways.

[3] L. 133 and further CC traditionally applied to land transportation. However with the *code des transports* some changes were made, and it is disputed whether now railway transportation still falls under the scope.

The core mode of COTIF-CIM is for example carriage by rail. However the scope extends to national transport by road and inland waterways in addition to the rail transport and also to international transport by inland waterways or by sea when it happens on registered lines. Thus, hinterland transportation from the rail terminal can fall under COTIF-CIM, irrespective of the means of transportation that is being used. The plusmode of the Montreal convention is much more limited than the one of COTIF-CIM. It applies only in case of non-localised damage, and then there is only a presumption that damage arose during the air transportation. Moreover this presumption only plays within a very limited field: it applies only to transport with the purpose of picking up, delivery or transhipment. Except for some minor exceptions neither CMR, CMNI or the Hague-Visby Rules have a plusmode. Thus also the type III integration is not covered by a uniform liability regime, allowing the parties to predict their liability position in case of integrated hinterland logistics. In the future the situation might change for carriage by sea, if the Rotterdam Rules get great acceptance, as they have a very wide plusmode, bringing all carriage performed in addition to the sea carriage under the Rules, with only an exception for carriage governed by other conventions.

Second problem: parties can often not be certain about non-applicability or exclude applicability themselves.

Taking into account the priority of international law, except when parties can ascertain the non-applicability of carriage conventions at the time of the conclusion of the contract of carriage, in case of international freight integration contracts the parties will only very rarely have certainty with regard to the applicable law. Such certainty is only possible if the conventions themselves allow to ascertain the (non-)applicability at the time of the conclusion of the contract. As all conventions are mandatorily applicable within their scope of application, parties cannot exclude applicability contractually or even choose for a specific convention. This choice will be invalid insofar as the liability regime of the chosen convention conflicts with the mandatorily applicable regime.

Ascertaining the non-applicability of carriage laws is possible in two situations. First of all, this certainty is possible when these laws require a consent on the means of transportation to be used, and this at the time of the conclusion of the contract. Secondly, certainty is also possible when the laws require a specific transport document to be issued, and the issuance of such a document can be contractually excluded, without limiting the choice of the carrier to select the means of transportation. If on the contrary the way of performance of the contract is taken into account, applicability is uncertain until the performance of the contract. This is for example the case for the Montreal Convention, applying to carriage performed by aircraft for reward. Consequently in case of type I integration certainty with regard to the applicable law will only be possible if the non-applicability of all other potentially applicable regimes can be ascertained at the time of the conclusion of the contract, and the parties can contractually agree upon the applicability of the Montreal Convention, irrespective of the means of transportation that is being used.

Since most conventions refer to means of transportation contractually agreed upon (see for example CMR "*this Convention shall apply to every contract for the carriage of goods by road in vehicles for reward*"), one could assume that for these regimes certainty with regard to the non-applicability of these conventions is possible at the time of the conclusion of the contract. However, doctrine and (some) case law in for example Germany, Holland and France interpret this requirement in such a

way that even when the contract offers the carrier freedom to select the means of transportation, the contract can still fall within the scope insofar as the carrier selects the specific means of transportation that falls within the scope of the law. According to this interpretation the choice of the carrier contractualises the means of transportation. Although we disagree with this position, and support the Belgian position that indeed requires a consent at the time of the conclusion of the contract, still the result is that in many jurisdictions the non-applicability of norms that require the means of transportation to be contractually agreed upon cannot be ascertained at the time of the conclusion of the contract either. In these jurisdictions all norms, except for the ones that require the issuance of a specific carriage document,[4] are potentially mandatorily applicable. Consequently, parties cannot have legal certainty with regards to the applicable law at the time of the conclusion of the contract.

Contractual techniques to increase certainty.

Although the mandatory applicability of carriage laws limits the room for party initiative, still with a combination of forum and choice of law clauses, parties can increase certainty with regard to the applicable transport law. However, as the incorporation of such clauses adds to the negotiation costs, and the consequences cannot be predicted with absolute certainty, the incorporation of such clauses might be the best solution, but it is not a perfect solution.

Forum shopping: Belgium

As it was stated in the previous chapter, in Belgian case law, it is well established that when laws require a consent with regard to the means of transportation, this consent has to exist at the time of the conclusion of the contract. Consequently when an exclusive jurisdiction clause is included in the contract, granting jurisdiction to Belgian courts, the parties can have certainty with regard to the non-applicability of all carriage conventions, except for the Montreal Convention, at the time of the conclusion of the contract.

The problem is however, that although the Brussels I-Regulation allows for exclusive jurisdiction clauses, there are some conventions, like CMR and COTIF-CIM, that don't allow for such exclusive jurisdiction clauses. As the jurisdiction rules of CMR and COTIF-CIM have priority over those of the Brussels I-Regulation, the fact that a possible case will indeed be decided upon by the Belgian courts, cannot be ascertained at the time of the conclusion of the contract. If the case is brought before another court first, the Brussels I-Regulation doesn't allow the court given competence in the exclusive jurisdiction clause to rule upon the matter until the other court has found it is incompetent; However the other court will, if it finds for example CMR to be applicable, accept jurisdiction if one of the conditions of article 31 is fulfilled. Consequently, the non-applicability of CMR and COTIF-CIM cannot be ascertained either at the time of the conclusion of the contract. Since carriage by road and carriage by rail are options that are possible in all three types of freight integration, this is a great threat to the possibility to contractually increase legal certainty.

[4] The only norms that are relevant for our research and that require the issuance of a specific transport document are the Hague Visby rules and national maritime legislations. Although the b/l is issued after the conclusion of the contract, parties can validly contractually exclude the issuance of a b/l and by doing this prevent the applicability of the Hague Visby Rules.

Nevertheless, there might be some solutions. First of all, the parties can include an arbitration clause, as CMR and COTIF-CIM do allow for exclusive arbitration clauses. A problem to this is however that for small contracts, like the parcel contracts, arbitration doesn't seem to be a realistic choice. Another possibility is to include a clause awarding damages to the other party in case of the breach of the choice of court agreement.[5] In this clause an additional competence clause giving competence to the Belgian courts should be included. This way, if one party violates the exclusive jurisdiction clause, the other party can go to the Belgian courts. As the Belgian courts will not find the conventions having priority to the Brussels I-Regulation applicable, they will find a breach of the jurisdiction agreement. In order not to have the courts dismiss the claim as a violation of *res judicata.*

Even if the Belgian courts are made competent, and parties have certainty with regard to this competence, this is not sufficient for legal certainty with regard to the applicable carriage regime. Just like the conventions national Belgian transport law is very fragmented, and the scope rules of different laws don't allow for certainty with regard to the (non-)applicability at the time of the conclusion of the contract. Therefore in addition to the jurisdiction clause, parties should include a choice of law clause. Here there are two possibilities: either choose for a national law that offers a uniform liability position, or allows to create your own uniform regime (e.g. a non-mandatory regime), or choose for a regime that allows for a choice of law for the liability regime of a convention, that can thus be made applicable irrespective of the mode that is being used for the carriage. Because even with a jurisdiction clause, still Montreal Convention will be applicable if the carriage is performed by air. As said before, this convention refers to the performance of the contract. Consequently for parcel delivery contracts legal certainty will only be possible if the parties make a choice of law for the Montreal convention.

As the Rome I-Regulation doesn't allow for a primary choice of law for international conventions, this choice of law needs to be accepted in the national law of the country. For example Belgian law does not allow for such a choice for conventions, insofar as these conventions contradict mandatory national law. The same is true for French law. There are however several regimes that allow for a choice of law for a convention, are non-mandatory and allow for any contractual provisions or finally that offer legal certainty themselves. Dutch law is one of the regimes that allows for a choice of law for international conventions, even if they contradict national law. An example of the second possibility is English law, as it is to a large extend non-mandatory. When parties agree not to issue a bill of lading, in case of container transportation the law of bailment or a chosen regime will be applicable. The German law is an example of how law can offer certainty itself. German national transport law offers a uniform framework in case of land transportation (and national air transportation) that can also be applied to sea transportation when no bill of lading is issued. Moreover the possibility to adapt the limits of liability in the general conditions allows to bring the liability regime close to the Montreal regime in case of parcel transportation without an individually negotiated contract being required.

Even though it requires a very active role in contract writing, it is possible for parties to enjoy legal certainty with regards to the applicable liability regime at the time of the conclusion of the contract. However this possibility only exists when both parties are interested in this certainty. However in general conditions of freight integrators we often see clauses adding to the uncertainty. Because of

[5] *K. TAKAHASHI "Damages for Breach of a choice-of-court agreement", Yearbook of private international law, 2008, (57) 84-86*

the additional costs of this active role in contract drafting and the fact that weaker parties are likely not to enjoy this certainty, a change in law is recommended.

Legislative initiatives to increase certainty.

In the PhD research we made 18 recommendations to improve the liability framework. Taking into account the time constraints we pick out some of them.

Possible changes to Belgian law

Since the Belgian interpretation of the scope rules of conventions offers most legal certainty, this is a unique opportunity for Belgium to attract freight integration claims. However in order to optimize this benefit, national carriage law should be changed. There are four possibilities that we recommend. (1) First possibility is to take over the German regime of §407 HGB but expand the scope to contracts of carriage by sea not covered by a bill of lading. A choice for this regime allows to benefit from the existing case law. Moreover the possibility to change the liability limits in general conditions allows carriers to make their contracts back to back to international conventions. (2) The second possibility is to take CMR as the liability regime applying to every contract of carriage, and to make of CMR the general carriage regime. Since there is so much case law available on this regime, again this offers parties legal certainty. (3) Withdraw the mandatory mode specific laws and go back to the general transport law of 1891, allowing the parties to choose their own regime, with general rules as back up. (4) Allow for a choice of law for international conventions, even this choice is contrary to mandatory national laws.

"Minor" changes to conventions

In order to make transport law fit for freight integration, a structural change to transport law is required, whereby all possible alternative means of transportation are brought under a uniform regime. I'm well aware of the utopian character of such a change. However, there are minor changes that could be made and that could already take away the uncertainty.

A first step to legal certainty could be to change or clarify the scope rule in such a way that the consent at the time of the conclusion of the contract determines the applicability. With such a change the regimes would simply not apply when they cannot offer legal certainty. Such a change would eliminate the need for a forum clause and the necessary choice for the Montreal Convention when carriage by air is an option.

The second "minor" change would be to make a new convention allowing contract parties in contracts for carriage between parties to these conventions to freely choose the applicable law between conventions that are possibly applicable, insofar as multiple regimes are possibly applicable. Such a convention would not only be very useful for freight integration contracts, but also for multimodal carriage contracts. If for a specific good it is not considered as being problematic that different regimes might apply depending on the mode of transportation that is used, it should also not be considered as a problem that parties can choose themselves among these regimes.

"Major" changes to the law.

There are two major changes we propose. The first one doesn't require a structural change of transport law, but merely a change in the mind-set of actors in the transport law: the change from a

mandatory transport law to a supplementary transport law. The second one both requires structural changes and a changing mind-set: a (r)evolution from a transport means-based carriage regime to a cargo-based carriage regime.

The first proposal is to make (international) carriage law just like international sales law supplementary. This way parties can opt out of inappropriate carriage regimes themselves, just like they can do in the Vienna Sales Convention. Although the mandatory character is defended by many scholars, one can wonder why it is not deemed to be necessary to defend the position of the ex-works buyer as party to the sales contract, while he should be defended in his capacity of cargo-interest. Moreover one can question in more and more situations whether transport law offers any protection. Due to the inflation and the increase of the value of goods/ kilogram more and more goods exceed the kilo-limitation by far.

Because of the great difference of the value per kilogram of for example commodities like cereals and on the other hand electronics like *ipads*, our last proposal is to shift from a mode-based liability regime to a cargo-based regime. The determining value of the risk involved in carriage is not any longer primarily determined by the means of transportation but by the specific type of cargo. Therefore we propose to make specific regimes for parcels, containers and bulk transportation. Such liability regimes could, to a large extend be based upon Montreal Convention for parcel transportation, CMR or COTIF-CIM for container transportation and the Hague Visby Rules for bulk transportation.

Conclusion: freight integration what is the way forward

This research is another example that when law doesn't follow evolutions in practice, in the end there often is a collision between the two. Although writing adequate contracts should be mainly the responsibility of contract parties, the mandatory framework doesn't allow these parties to do so. Therefore a change of law is not only wishful but also necessary in order to allow for further optimization of transport. Taking into account the long process before the Rotterdam Rules came into existence, for now parties will have to establish certainty themselves by means of forum clauses and choice of law clauses. To speed up the process, it would be desirable if a European initiative is taken, to allow for a uniform liability regime for European transport.